BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NORMA SOSA Claimant	)	
VS.	)	Docket No. 1,020,302
DOLD FOODS LLC. Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the August 3, 2011, Review and Modification Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on November 18, 2011. The Director appointed E. L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample.[1] Dale V. Slape of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant is permanently, totally disabled.

The Board has considered the record and adopted the stipulations listed in the Review and Modification Award. In addition, the Board has considered the preliminary hearing transcripts of February 3, 2005, and May 1, 2007.

ISSUES

Respondent contends claimant remains capable of engaging in substantial and gainful employment. As such, respondent argues she is not permanently, totally disabled but, instead, is entitled to a work disability.

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[1] As of October 31, 2011, Ms. Sample has been replaced on the Board by Gary Terrill. However, due to a conflict, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. Kinch will continue to serve as a Board Member Pro Tem in this case.

Claimant argues she is essentially and realistically unemployable and the Review and Modification Award should be affirmed.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

On November 16, 2004, claimant filed an Application for Hearing claiming injuries caused by repetitive work to her upper back, lower back and neck each and every working day. On February 5, 2008, claimant filed an Amended Application for Hearing claiming she suffered injuries beginning in spring 2004 and continuing each and every working day thereafter. She claimed injuries to her upper back, neck, bilateral shoulders and bilateral upper extremities. On November 30, 2009, the ALJ entered a Stipulated Running Award in which the parties agreed that claimant suffered a 25 percent permanent partial impairment of function as a result of her work-related accidental injuries. Claimant continued to work at respondent until September 14, 2010, with restrictions. She had a flare-up of her symptoms in 2010 and was seen by Dr. Bernard Hearon. Respondent sent claimant to Dr. Paul Stein on August 31, 2010. Thereafter, she was terminated by respondent based on work restrictions recommended by Dr. Stein.

Claimant testified she had applied for unemployment since her termination which required her to agree she is ready, willing and able to work, but her application was denied. She has made job applications to fast food restaurants but has not been offered a position. Claimant said she did not think she could perform the work in a fast foot restaurant, but she needed to find work. She has applied for Social Security disability.

Dr. Paul Stein, a board certified neurosurgeon, first saw claimant on January 19, 2009, at the request of the ALJ. She told him she started having pain in her upper back, right shoulder, and arm sometime in 2004. She said she had pain in her right upper back, right shoulder, and right side of the neck. Dr. Stein found claimant to have a combined permanent partial impairment to the whole person of 27 percent for her cervicothoracic spine, ulnar nerves, right wrist, and bilateral shoulders. He placed the following restrictions on claimant for her areas of injury: avoid repetitive overhead activity; avoid activity requiring repetitive or frequent bending and twisting of the neck or placing the neck in strained positions; avoid frequent repetitive activity with either upper extremity; avoid using impacting or vibrating power tools; and avoid leaning on the inner aspect of either elbow; avoid lifting more than 15 pounds rarely with the right hand and 10 pounds occasionally.

Dr. Stein saw claimant a second time on August 31, 2010, this time at the request of respondent. Claimant told him she was working full time at respondent on the production line, although with a five-pound lifting restriction. She told Dr. Stein her condition had gotten worse. Her arms were weaker and she was in more pain. She said previously her symptoms had been greater on the right, but she was equally symptomatic

in August 2010. She had burning and pain at both elbows and both forearms into the wrists and had seen Dr. Bernard Hearon for additional symptoms in her hands.

Dr. Stein noted claimant's progressive symptomatology in the upper extremities and stated it did not "surprise me given that she has continued with frequently repetitive activity with both upper extremities."[2] He found claimant had a better range of motion in her right shoulder than appeared in January 2009, but she had less range of motion in her left shoulder. Dr. Stein had no recommendation for additional testing or treatment, other than consideration of pain management. He stated: "As long as the patient continues with frequently repetitive activity involving her upper extremities, she will continue to be symptomatic and likely complain of increasing symptoms over time."[3] He did not find that claimant had any increase in her permanent impairment of function. Dr. Stein agreed with Dr. Hearon that claimant should limit her repetitive activity and should not perform production line work.

Dr. Stein stated that he was not an expert in the vocational field, but if there was work available within his restrictions, claimant could perform that work. He believes she is employable as long as she follows the restrictions he has outlined.

Dr. Stein reviewed the task list prepared by Karen Terrill. Of the 21 tasks on the list, he opined that claimant was unable to perform 16 for a 76 percent task loss. He reviewed the task list prepared by Jerry Hardin. Of the 24 tasks on the list, he said claimant would be unable to perform 19 for a 79 percent task loss. He reviewed the task list prepared by Steve Benjamin. Of the 31 tasks on that list, he said claimant could not perform 17 for a 54.8 percent task loss.

Dr. Chris Fevurly, who is board certified in internal medicine, preventive medicine and is a board certified independent medical examiner, evaluated claimant on February 25, 2011, at the request of respondent. Claimant complained of bilateral arm pain, distal to the elbow, shoulder pain right greater than left, right wrist pain, right upper back pain, and occasional tingling and numbness in her right hand and fingers.

Dr. Fevurly noted in claimant's medical history that claimant has had four surgeries to her bilateral upper extremities. She had a right shoulder decompression in 2005, right ulnar nerve transposition surgery on June 12, 2006, left ulnar nerve transposition surgery on September 28, 2006, and right wrist triangular fibrocartilage complex debridement performed on November 21, 2007. Dr. Fevurly said claimant's current pain is generalized throughout both upper extremities and is not localized to her right shoulder, right wrist or ulnar nerve distribution. He also stated that he believes claimant's right shoulder

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[2] Stein Depo., Ex. 1 at 3.

[3] *Id.*

impingement is predominantly the result of aging and wearing in the rotator cuff as a natural consequence of living. He said claimant's current pain is nonspecific in nature and is a reflection of an intolerance to performance of activity. She has pain when she does repetitious hand tasks, but it is not synonymous with disease or injury. He found no objective factors that would explain her persistent pain.

After reviewing claimant's past records and testing and conducting a physical examination, Dr. Fevurly diagnosed her with nonspecific bilateral arm pain. He suspected most of claimant's chronic pain was associated with non physical factors. He said her grip strength test suggested some symptom magnification. Claimant told Dr. Fevurly she had been no better since being away from her work at respondent, which he said was consistent with nonspecific arm pain. Dr. Fevurly stated that chronic pain in the vast majority of cases is in the brain, affected by psychological and social behavioral and environmental issues, and are not secondary to pathology in the arms.

Dr. Fevurly said there is nothing that would limit claimant's ability to return to repetitive hand tasks. He did not place any permanent restrictions on claimant's activities. He reviewed the task list prepared by Mr. Benjamin and opined that claimant could perform all the job tasks for a 0 percent task loss.

Karen Terrill, a rehabilitation consultant, interviewed claimant on March 4, 2011, at the request of claimant's attorney. They had a follow-up telephone interview on March 7, 2011. An interpreter was utilized during her interviews. Ms. Terrill prepared a list of 21 tasks claimant had performed in jobs during the 15-year period before her series of accidents.

Claimant told Ms. Terrill she studied computer science at Colegio de Bachilleres from 1989 until 1991 while living in Mexico. She then went to the Instituto Tecnologico de Durango from 1992 until 1995, completing her license in computer science. She immigrated to the United States in 1997 and became a citizen in 2003. She understands and speaks very little English. She is unable to read an English newspaper. She is fluent in written and spoken Spanish. She has no additional skills not reflected in her work history. Claimant is familiar with Microsoft Word and said she has an extensive knowledge of computers, but the knowledge is from 1995. She is not proficient on a keyboard and uses a hunt-and-peck method of typing.

Claimant was not working at the time Ms. Terrill interviewed her. She had a 100 percent wage loss. Ms. Terrill believed that claimant is unable to engage in any type of substantial and gainful employment based on 10 factors: (1) She is unable to speak and understand English; (2) although she has an a degree, it was obtained in Mexico and she has never been able to use that education in the United States; (3) although her training was in computers, what she learned is now obsolete; (4) she uses a hunt and peck method of typing; (5) she has only worked for two employers in the last 15 years and both were menial jobs and with no transferable job skills; (6) she can no longer perform production

work; (7) she is limited to a sedentary/light level of work based on her lifting restrictions; (8) she is unable to repetitively use her upper extremities; (9) she needs task rotation; and (10) she is unable to repetitively bend or twist her neck.

Jerry Hardin, a human resource consultant, met with claimant and her translator on November 2, 2010, at the request of her attorney. Claimant was not working and had a 100 percent wage loss. Together they prepared a list of 24 tasks claimant had performed in the 15-year period before her series of accidents. Mr. Hardin concluded that claimant is essentially and realistically unemployable based on Dr. Stein's restrictions and his personal interview with her He believes she should be on Social Security disability.

Mr. Hardin said claimant is able to speak and understand English quite well. He had a translator with him to help him with claimant, but claimant did quite well and he did not think communicating in English would be a hindrance for her. Claimant has a good education, but her skills in reading and writing English are limited. She had problems filling out paperwork in English. Mr. Hardin said that fast food restaurant work would not fit within her restrictions because making or serving hamburgers requires repetitive use of the hands, and claimant would be unable to do that job. He also noted the economy in Wichita is not good insofar as the number of people unemployed.

Steve Benjamin, a vocational rehabilitation consultant, met with claimant and an interpreter on March 28, 2011, at the request of respondent. He prepared a task list with 31 tasks that claimant had performed in the 15-year period before her series of accidents.

Claimant indicated to Mr. Benjamin that she had a Bachelor's degree in computer science from an institute in Mexico. She is a United States citizen. Mr. Benjamin said that in order to become a citizen, claimant would have had to be able to read, write and understand simple words and phrases in English. Mr. Benjamin thinks there is also a written test for U.S. citizenship that is to be completed in English.

Claimant told Mr. Benjamin that she applied for unemployment benefits, which requires the applicant to agree that she is ready, willing and able to work. Claimant told Mr. Benjamin that she had made applications to various employers but had not been offered any jobs. Claimant had applied for Social Security disability.

Mr. Benjamin opined that, in referencing Dr. Fevurly's restrictions, claimant should be able to go back to work in the job she held at respondent or a similar position with no loss of wages. In referencing Dr. Stein's restrictions, however, it was Mr. Benjamin's opinion that if claimant were to re-enter the open labor market, she would only be capable of entry level work, and she would earn close to the minimum wage or about $290 per week. He believed that claimant would be capable of working as a home attendant, a day care worker, a teacher assistant, fast food worker or hand presser.

Mr. Benjamin said that having a bachelor's degree from a Mexican college is not the same as having one in the United States. Claimant's degree in computer science probably would not carry the same weight as a degree from a school in the United States.

If claimant worked as a home attendant, she would be better suited to someone who speaks less English and more Spanish. Mr. Benjamin did not know what percentage of Wichita's population spoke Spanish. He also said that in applying for any job, claimant would be more limited than someone who did not have restrictions and would be more bilingual.

PRINCIPLES OF LAW

An award may be modified when changed circumstances either increase or decrease the claimant's permanent partial general disability. K.S.A. 44-528 permits modification of an award in order to conform to the changed conditions.[4]

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.[5]

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[6] Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.[7]

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[4] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[5] K.S.A. 44-528.

[6] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[7] *See*, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows: "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*[8] held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

ANALYSIS

The ALJ found claimant permanently and totally disabled as a consequence of her April 11, 2005, work-related injuries. The ALJ arrived at this conclusion based largely upon the expert medical testimony of Dr. Stein and of the vocational experts, Karen Terrill and Jerry Hardin, as well as claimant's testimony. The Board likewise finds the opinions of Dr. Stein, Ms. Terrill and Mr. Hardin more persuasive than those of Dr. Fevurly and Mr. Benjamin in this instance. The opinions of Dr. Stein, Ms. Terrill and Mr. Hardin were more consistent with claimant's description of her injuries and capabilities. And the ALJ apparently found claimant to be a credible witness. Furthermore, the parties stipulated that

[8] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

a 25 percent permanent impairment of function resulted from claimant's accidental work injuries based, in part, upon the medical opinions of Drs. Stein and Murati.[9] The Board is mindful of the difference of opinion as between Ms. Terrill and Mr. Hardin concerning claimant's ability to understand and speak English. Nevertheless, they are otherwise largely in agreement concerning claimant's inability to find work within Dr. Stein's restrictions. Given claimant's lack of transferable skills, she is realistically unemployable.

CONCLUSION

The Board finds claimant is permanently and totally disabled from engaging in substantial, gainful employment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge Nelsonna Potts Barnes dated August 3, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge

[9] Stipulated Running Award (Nov. 30, 2009).